

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 04, 2022

SEAN F. McAVOY, CLERK

LAINY O.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:20-CV-00422-ACE

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

ECF No. 17, 20

BEFORE THE COURT are cross-motions for summary judgment.

ECF No. 17, 20. Attorney Christopher H. Dellert represents Lainey O. (Plaintiff); Special Assistant United States Attorney Shata Ling Stucky represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

On April 25, 2018, Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income alleging disability since April 1, 2018, due to fibromyalgia, irritable bowel syndrome, abdominal pain, gastritis, low back pain, left shoulder impingement, polycystic ovarian syndrome, bilateral myopia,

¹To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. See LCivR 5.2(c).

1 anxiety, and depression. Tr. 248, 253, 273. The applications were denied initially
2 and upon reconsideration. Administrative Law Judge (ALJ) Marie Palachuk held a
3 hearing on November 13, 2019, Tr. 35-56, and issued an unfavorable decision on
4 November 27, 2019, Tr. 15-29. The Appeals Council denied Plaintiff's request for
5 review on September 8, 2020. Tr. 1-6. The ALJ's November 2019 decision thus
6 became the final decision of the Commissioner, which is appealable to the district
7 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review
8 on November 17, 2020. ECF No. 1.

9 **STATEMENT OF FACTS**

10 Plaintiff was born on December 7, 1995, and was 22 years old on the
11 disability onset date, April 1, 2018. Tr. 248, 253. She completed school through
12 the 12th grade. Tr. 274. Plaintiff's disability report indicates she stopped working
13 on April 1, 2018, because of her conditions. Tr. 273. Plaintiff testified at the
14 administrative hearing that chronic back pain, chronic nausea, and chronic
15 migraines prevented her from working. Tr. 42. She stated she constantly had back
16 pain which was exacerbated by moving or walking. Tr. 42. She indicated at one
17 stretch she could stand 10 to 15 minutes, walk about ten minutes, and sit for 30 to
18 45 minutes but would need to shift positions. Tr. 42. She had difficulty with
19 bending, squatting, and taking stairs. Tr. 42-43. Plaintiff testified she also had
20 pain in her shoulders and could only lift her arms to chest-level. Tr. 44. She had
21 difficulty dressing and cooking and could lift only about a gallon of milk with one
22 arm. Tr. 44-45. She stated she also had constant headaches and would lie down in
23 a dark, quiet room and avoid movement when she experienced a particularly bad
24 headache. Tr. 45-46. She indicated she was constantly nauseous as well. Tr. 48.

25 **STANDARD OF REVIEW**

26 The ALJ is tasked with "determining credibility, resolving conflicts in
27 medical testimony, and resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035,
28 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with

1 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
2 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
3 only if it is not supported by substantial evidence or if it is based on legal error.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
5 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
6 1098. Put another way, substantial evidence “is such relevant evidence as a
7 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
8 *Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. NLRB*, 305
9 U.S. 197, 229 (1938). If the evidence is susceptible to more than one rational
10 interpretation, the Court may not substitute its judgment for that of the ALJ.
11 *Tackett*, 180 F.3d at 1098; *Morgan v. Commissioner of Social Sec. Admin.*, 169
12 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative
13 findings, or if conflicting evidence supports a finding of either disability or non-
14 disability, the ALJ’s determination is conclusive. *Sprague v. Bowen*, 812 F.2d
15 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
16 substantial evidence will be set aside if the proper legal standards were not applied
17 in weighing the evidence and making the decision. *Browner v. Secretary of Health*
18 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

19 SEQUENTIAL EVALUATION PROCESS

20 The Commissioner has established a five-step sequential evaluation process
21 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
22 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant
23 bears the burden of establishing a prima facie case of disability benefits. *Tackett*,
24 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a
25 physical or mental impairment prevents the claimant from engaging in past
26 relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant cannot perform past
27 relevant work, the ALJ proceeds to step five, and the burden shifts to the
28 Commissioner to show (1) that Plaintiff can perform other substantial gainful

1 activity and (2) that a significant number of jobs exist in the national economy
2 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir.
3 1984). If a claimant cannot make an adjustment to other work in the national
4 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

5 **ADMINISTRATIVE DECISION**

6 On November 27, 2019, the ALJ issued a decision finding Plaintiff was not
7 disabled as defined in the Social Security Act.

8 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
9 activity since April 1, 2018, the alleged disability onset date. Tr. 17.

10 At step two, the ALJ determined Plaintiff had the following severe
11 impairments: morbid obesity (BMI>39), fibromyalgia, headaches, and low back
12 and shoulder pain. Tr. 18.

13 At step three, the ALJ found Plaintiff did not have an impairment or
14 combination of impairments that meets or medically equals the severity of one of
15 the listed impairments. Tr. 21.

16 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
17 Plaintiff could perform light exertion level work with the following limitations:
18 she could frequently climb ramps or stairs, balance, stoop, kneel, crouch, and
19 crawl, but only occasionally climb ladders, ropes, or scaffolds; her overheard
20 reaching with the left, non-dominant upper extremity was limited to frequent; and
21 she must avoid concentrated exposure to vibrations and hazards (such as
22 unprotected heights and moving machinery). Tr. 23.

23 At step four, the ALJ found Plaintiff was able to perform her past relevant
24 work as a customer service clerk and housekeeping cleaner. Tr. 26-27.

25 Alternatively, at step five, the ALJ determined that, based on the testimony
26 of the vocational expert, and considering Plaintiff's age, education, work
27 experience, and RFC, Plaintiff was capable of making a successful adjustment to

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1 other work that exists in significant numbers in the national economy, including
2 the job of housekeeping, cleaner. Tr. 27-28.

3 The ALJ thus concluded Plaintiff was not under a disability within the
4 meaning of the Social Security Act at any time from April 1, 2018, the alleged
5 onset date, through the date of the ALJ's decision, November 27, 2019. Tr. 28-29.

6 ISSUES

7 The question presented is whether substantial evidence supports the ALJ's
8 decision denying benefits and, if so, whether that decision is based on proper legal
9 standards.

10 Plaintiff asserts the ALJ erred: (1) in failing to properly evaluate Plaintiff's
11 morbid obesity pursuant to SSR 19-2p; (2) in her weighing of Plaintiff's subjective
12 complaints; and (3) by failing to consider all of Plaintiff's impairments, severe and
13 non-severe, in assessing Plaintiff's RFC. ECF No. 17 at 2.

14 DISCUSSION

15 A. Obesity

16 Plaintiff first contends the ALJ erred by failing to properly evaluate the
17 impact of her obesity on her ability to function. ECF No. 17 at 3-6. Defendant
18 responds substantial evidence supports the ALJ's assessment of Plaintiff's obesity.
19 ECF No. 20 at 4-6.

20 According to the social security rules, obesity will be deemed a "severe"
21 impairment "[i]f the person's obesity, alone or in combination with another
22 impairment(s), significantly limits his or her physical or mental ability to do basic
23 work activities." SSR 19-2p. Although obesity is not a separately listed
24 impairment, the functional limitations caused by obesity, alone or in combination
25 with another impairment, may medically equal a listing. *Id.* "Obesity in
26 combination with another impairment(s) may or may not increase the severity or
27 functional limitations of the other impairment." SSR 19-2p. However, the ALJ
28 will not make general assumptions about the severity or functional effects of

1 obesity combined with another impairment; rather, the ALJ will “evaluate each
2 case based on the information in the case record.” *Id.*

3 Here, the ALJ found obesity to be a severe impairment at step two of the
4 sequential process. Tr. 18. The ALJ then held there was no evidence that
5 Plaintiff’s obesity combined with her other impairments to medically equal a listed
6 impairment. Tr. 23.

7 With respect to her obesity argument, Plaintiff merely cites her own hearing
8 testimony describing postural limitations, fatigue and inability to work.
9 ECF No. 17 at 5-6. However, there is no record evidence indicating Plaintiff’s
10 fatigue or other alleged difficulties were caused or exacerbated by obesity.
11 Moreover, the ALJ adequately considered the impact of Plaintiff’s obesity in her
12 RFC determination² by limiting Plaintiff to light exertion level work and
13 specifically finding Plaintiff’s obesity “would contribute to the postural and
14 environmental limitations assessed.” Tr. 26.

15 The Court thus finds the ALJ did not err with respect to her assessment of
16 Plaintiff’s obesity in this case. *See Burch*, 400 F.3d at 684 (“[Plaintiff] has not set
17 forth, and there is no evidence in the record, of any functional limitations as a
18 result of her obesity that the ALJ failed to consider.”).

19 **B. Plaintiff’s Subjective Complaints**

20 Plaintiff next challenges the ALJ’s rejection of Plaintiff’s subjective
21 allegations. ECF No. 17 at 6-11. Defendant responds that substantial evidence
22 supports the ALJ’s assessment of Plaintiff’s subjective complaints. ECF No. 20
23 at 6-13.

24
25 ²In evaluating a claimant’s obesity, the ALJ’s RFC assessment must
26 “consider all work-related physical and mental limitations, whether due to a
27 person’s obesity, other impairment(s), or combination of impairments.”
28 SSR 19-2p.

1 It is the province of the ALJ to make credibility determinations. *Andrews*,
2 53 F.3d at 1039. However, the ALJ's findings must be supported by specific
3 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
4 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
5 testimony must be "specific, clear and convincing." *Lester v. Chater*, 81 F.3d 821,
6 834 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must
7 identify what testimony is not credible and what evidence undermines the
8 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,
9 918 (9th Cir. 1993).

10 In this case, the ALJ found Plaintiff's medically determinable impairments
11 could reasonably be expected to cause the alleged symptoms; however, Plaintiff's
12 assertion of total disability under the Social Security Act was not supported by the
13 weight of the evidence. Tr. 24.

14 The ALJ first determined Plaintiff's allegations of disabling impairments
15 and limitations were not consistent with the objective medical evidence of record.
16 Tr. 24. A lack of supporting objective medical evidence is a factor which may be
17 considered in evaluating an individual's credibility, provided it is not the sole
18 factor. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991); *Robbins v. Soc. Sec.*
19 *Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

20 The ALJ noted Plaintiff had complained of having daily headaches for 10
21 years, Tr. 603, and a headache log indicated almost daily headaches from June 19
22 to November 3, 2019, Tr. 352-353; however, the record reflects Plaintiff denied
23 headaches to providers from May 11, 2017, to November 2018, Tr. 24, 415, 446,
24 450, 463, 468, 585, Plaintiff denied headaches as recently as April 2, 2019, Tr.
25 595, and other medical reports did not discuss headaches at all, *see e.g.*
26 Tr. 617-618, 620-621. Tr. 24. Although Plaintiff complained of constant
27 headaches in an October 2019 medical report, Tr. 654, 657, the ALJ noted Plaintiff
28 showed no signs of headache that day. Tr. 24. Plaintiff also reported at that time

1 that going to a concert with really loud noise would trigger a severe worsening of
2 her headaches, Tr. 654, but the ALJ questioned why someone claiming constant
3 debilitating headaches would go to a concert with loud music, Tr. 24.

4 The ALJ also mentioned that contrary to Plaintiff's testimony of having to
5 sit in a quiet and dark room for hours because of her headaches, Tr. 45-46, the
6 October 2019 medical report indicated no reported sensitivity to light or sounds,
7 Tr. 654. Tr. 24.

8 The ALJ additionally indicated that while Plaintiff also complained of daily
9 nausea, Tr. 48, 603, the record documents nausea only as a reaction to some foods
10 or from medications, Tr. 396, 413, 598. Tr. 24.

11 Finally, the ALJ noted Plaintiff had been examined/evaluated by specialists
12 who found nothing wrong with her. Tr. 24. The ALJ indicated Plaintiff was
13 examined by a neurologist who, "did not think it was migraines," Tr. 654, and an
14 orthopedic evaluator was "unable to find any acute abnormal testing upon exam,"
15 Tr. 655. Tr. 24-25.

16 Based on the foregoing, the Court finds substantial evidence supports the
17 ALJ's determination that Plaintiff's subjective complaints were inconsistent with
18 the objective medical evidence of record.

19 The ALJ next mentioned Plaintiff's report that medication had helped with
20 her pain. Tr. 24. Plaintiff's opening brief does not specifically contest this finding
21 by the ALJ. *See Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2
22 (9th Cir. 2008) (the Court will not ordinarily consider matters on appeal that were
23 not specifically and distinctly argued in a party's opening brief). In any event, an
24 ALJ may rely on the effectiveness of treatment to find a plaintiff's testimony
25 unpersuasive. *See Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 599-
26 600 (9th Cir. 1999) (an ALJ may properly rely on a report that a plaintiff's
27 symptoms improved with the use of medication); *Odle v. Heckler*, 707 F.2d 439,

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1 440 (9th Cir. 1983) (noting impairments that are controlled by treatment cannot be
2 considered disabling).

3 As indicated by the ALJ, Tr. 24, the record reflects the medication
4 Venlafaxine helped Plaintiff's fibromyalgia pain, Tr. 396, but she stopped taking it
5 in August 2018 due to severe mood swings, Tr. 550. She was then prescribed
6 Lyrica, but again reported she stopped taking the medication due to mood swings.
7 Tr. 532. The ALJ observed it was difficult to understand the reasons Plaintiff gave
8 for stopping medication that helped with pain she alleged severely limited her
9 ability to function. Tr. 24.

10 The evidence of record supports the ALJ's findings that Plaintiff's
11 symptoms improved with the use of medication and her decision to stop taking the
12 helpful medications detracted from her credibility.

13 The ALJ also found Plaintiff's "reasonably high-functioning activities of
14 daily living" during the relevant time period did not support her allegation of total
15 disability. Tr. 25

16 It is well-established that the nature of daily activities may be considered
17 when evaluating credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).
18 For daily activities to discount subjective symptom testimony, the activities do not
19 need to be equivalent to full-time work; it is sufficient that a claimant's activities
20 "contradict claims of a totally debilitating impairment." *See Molina v. Astrue*,
21 674 F.3d 1104, 1112-1113 (9th Cir. 2012). A claimant, however, need not be
22 utterly incapacitated to receive disability benefits, and completion of certain
23 routine activities is insufficient to discount subjective symptom testimony. *Id.* at
24 1112-1113 (noting that a "claimant need not vegetate in a dark room in order to be
25 eligible for benefits" (quotation marks omitted)); *Vertigan v. Halter*, 260 F.3d
26 1044, 1050 (9th Cir. 2001) ("This court has repeatedly asserted that the mere fact
27 that a plaintiff has carried on certain daily activities, such as grocery shopping,
28 driving a car, or limited walking for exercise, does not in any way detract from her

1 credibility as to her overall disability. One does not need to be ‘utterly
2 incapacitated’ in order to be disabled.” (quoting *Fair*, 885 F.2d at 603)).

3 Here, the ALJ specifically identified Plaintiff’s ability to care for her pet cat,
4 prepare simple meals, sweep, mop, dust, do dishes, walk, drive a car, shop, handle
5 her own finances, read, write, play video games, paint and draw, make
6 jewelry/beading, play board games, watch movies, and occasionally go out to
7 dinner, although she did describe taking longer to do these activities. Tr. 25,
8 281-287. The ALJ further mentioned Plaintiff had worked at a call center during
9 the fourth quarter of 2018 with earnings very close to the substantial gainful
10 activity level. Tr. 25.

11 It appears reasonable for the ALJ to have concluded Plaintiff’s activities
12 were inconsistent with her allegations of totally disabling symptoms and thus
13 detracted from her overall credibility.

14 The ALJ also indicated Plaintiff’s presentation at the administrative hearing
15 was contrary to her claims of disabling limitations. Tr. 25.

16 The Ninth Circuit “sit and squirm” jurisprudence holds that a claimant’s
17 failure to exhibit signs of pain at a disability hearing is not substantial evidence for
18 the ALJ to discredit that claimant’s testimony. *See Gallant v. Heckler*, 753 F.2d
19 1450, 1455 (9th Cir. 1984) (“The fact that a claimant does not exhibit physical
20 manifestations of prolonged pain at the hearing provides little, if any, support for
21 the ALJ’s ultimate conclusion that the claimant is not disabled or that his
22 allegations of constant pain are not credible.”). Such “sit and squirm” observations
23 are disfavored. *Perminter v. Heckler*, 765 F.2d 870, 872 (9th Cir. 1985).

24 However, the Ninth Circuit has routinely refused to remand an ALJ’s decision for
25 the inclusion of such comments where the ALJ provided other, valid reasons for
26 rejecting the claimant’s testimony. *See Nyman v. Heckler*, 779 F.2d 528, 531 (9th
27 Cir. 1985) (where the ALJ’s decision “included an evaluation of [the claimant’s]
28 testimony, the stated opinions of both the examining and treating physicians,

1 objective medical evidence, and [commented on the claimant's] demeanor at the
2 hearing," the "inclusion of the ALJ's personal observations does not render the
3 decision improper"); *Orn v. Astrue*, 495 F.3d 625, 639-640 (9th Cir. 2007) (finding
4 an ALJ's personal observations of a claimant may not form the "sole basis for
5 discrediting" a claimant's subjective testimony, but an ALJ may properly consider
6 her observations at the hearing as part of the subjective testimony analysis).

7 The ALJ observed that while Plaintiff stated she could sit for only 30-45
8 minutes, would need to shift positions constantly, and could only lift and carry one
9 gallon of milk in each hand, Plaintiff entered the hearing carrying a large tote bag
10 without any difficulty, sat comfortably without fidgeting throughout the entirety of
11 the approximately 30-minute hearing, and thereafter arose from her chair, hoisted
12 her large tote bag onto her shoulder, and left the room without any noted difficulty.
13 Tr. 25.

14 Given the ALJ provided other valid reasons, supported by substantial
15 evidence, for finding Plaintiff less than fully credible, as indicated above, the Court
16 finds the ALJ did not reversibly err by also mentioning Plaintiff's presentation
17 during the administrative hearing was inconsistent with her assertions of
18 limitations.

19 The ALJ is responsible for reviewing the evidence and resolving conflicts or
20 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
21 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
22 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in
23 determining whether the ALJ's decision is supported by substantial evidence and
24 may not substitute its own judgment for that of the ALJ even if it might justifiably
25 have reached a different result upon *de novo* review. 42 U.S.C. § 405(g). After
26 reviewing the record, the Court finds that the ALJ provided clear and convincing
27 reasons, which are fully supported by the record, for finding Plaintiff's symptom
28 allegations were not entirely credible in this case.

1 **C. RFC Determination**

2 Plaintiff's final contention is that the ALJ erred at steps four and five of the
3 sequential evaluation process by failing to properly weigh Plaintiff's testimony and
4 analyze the impact of Plaintiff's obesity on her impairments and incorporate these
5 proper assessments into the ultimate RFC determination. ECF No. 17 at 11-13.
6 Defendant asserts the ALJ's RFC determination is supported by substantial
7 evidence. ECF No. 20 at 13.

8 As indicated above, Plaintiff has failed to demonstrate the ALJ has erred in
9 this case. Therefore, the ALJ's RFC determination is sustained. Since the ALJ's
10 decision is based on a properly supported RFC determination, the Court finds the
11 ALJ did not err at steps four or five of the sequential evaluation process.

12 **CONCLUSION**

13 Having reviewed the record and the ALJ's findings, the Court finds the
14 ALJ's decision is supported by substantial evidence and free of error.
15 Accordingly, **IT IS HEREBY ORDERED:**

16 1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
17 **GRANTED.**

18 2. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is **DENIED.**
19 **IT IS SO ORDERED.** The District Court Executive is directed to file this
20 Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall**
21 **be entered for DEFENDANT and the file shall be CLOSED.**

22 DATED October 4, 2022.



A handwritten signature in blue ink, reading "Alexander C. Ekstrom", is written over a horizontal line.

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE